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No. 94-105

In the Supreme Court of the United States

OCTOBER TERM, 1994

ROBERT A. AMATO, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the rules of the National Association of Securities Dealers, Inc., permit imposition of liability on a securities salesman (as distinguished from a securities firm) for excessive markups on sales of stock when the salesman was on notice at the time of the sales that the markups he was charging his customers were excessive.

2. Whether the Securities and Exchange Commission's order affirming petitioner's accountability for the excessive markups conflicts with established Commission precedent.

3. Whether the particular sanctions imposed on petitioner are so excessive as to constitute an abuse of discretion.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 18 F.3d 1281. The decision of the Securities and Exchange Commission (App., *infra*, 1a-11a)[1] is reported at 53 SEC Docket 1686.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1994. The petition for a writ of certiorari was filed on July 18, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] The decision of the Securities and Exchange Commission was not included in petitioner's appendix and is therefore reproduced in an appendix to this brief.

STATEMENT

Petitioner was a retail securities salesman and branch manager of the New Orleans office of the brokerage firm Brennan Ross Securities, Inc. (Brennan Ross), a member of the National Association of Securities Dealers, Inc. (the NASD). The court of appeals affirmed an order of the Securities and Exchange Commission sustaining disciplinary action taken against petitioner by the NASD for selling securities to cus-tomers at unfair prices in violation of Article III, Sections 1 and 4 of the NASD's Rules of Fair Practice.[2] Pet. App. A3.

1. The NASD is a national securities association registered with the Commission. As such, the NASD is responsible for regulating its member firms and persons associated with members, subject to comprehensive oversight by the Commission. See Sections 15A and 19 of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78*o*-3, 78s (1988 & Supp. IV 1992). Disciplinary action taken by the NASD is subject to review by the Commission. Exchange Act Sections 19(d)(2) and (e)(1), 15 U.S.C. 78s(d)(2) and (e)(1). On review, the Commission

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[2] Article III, Section 1 provides:

> A member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade.

NASD Manual ¶ 2151, at 2014 (1994).

Article III, Section 4 provides in pertinent part:

> In "over-the-counter" transactions * * * if a member buys for his own account from his customer, or sells for his own account to his customer, he shall buy or sell at a price which is fair, taking into consideration all relevant circumstances * * *.

NASD Manual ¶ 2154, at 2049 (1994).

considers the record *de novo* and makes its own findings on whether the conduct in question occurred and whether it violated the NASD's rules or the federal securities laws and rules. Exchange Act Section 19(e)(1), 15 U.S.C. 78s(e)(1). The Commission's findings and order are then subject to judicial review. Exchange Act Section 25(a), 15 U.S.C. 78y(a).

2. This case involves excessive markups charged by petitioner on sales of Barclays West, Inc. common stock to petitioner's retail customers. The Brennan Ross firm sold the bulk of the initial public offering of Barclays West stock in August 1989 (prior to the markup violations), with petitioner himself placing more than half of the units sold. Pet. App. A3; App., *infra*, 4a. During the first three months of trading in the secondary market, Brennan Ross handled more than 90% of all purchases and sales of Barclays West nationwide. Pet. App. A3. Petitioner's trading in Barclays West, along with that of the other three salesmen in the New Orleans office, accounted for 80% of all trading in the stock by the firm and 95% of the branch office's total business during those three months. *Ibid.*; App., *infra*, 3a. Petitioner personally handled most of those transactions. App., *infra*, 4a.

For each sales transaction, petitioner and the other salesmen were given a wholesale quotation and a retail quotation by the Brennan Ross trading department and could sell the stock to their customers at any price in the range between the two. Pet. App. A3. The gross commission to the firm on a transaction was the difference between the wholesale quotation and the price charged to the customer; the salesman's compensation was a percentage of that gross commission (in petitioner's case, 70%). *Ibid.*; SEC R. 1404. Although the salesmen were permitted to charge customers less than

the retail quotation announced by the trading desk, thereby giving themselves a lower commission, petitioner always charged his customers the full quoted retail price. Pet. App. A3; Pet. 8.

The level of markup on a securities transaction is computed by the NASD on the basis of the prevailing market price of the security. App., *infra*, 3a. The prevailing market price generally means the price at which dealers trade the security on the inter-dealer market. *Ibid.* However, where, as here, a dealer dominates and controls the market for a particular security, the Commission considers the prevailing market price to be the price the dealer itself has paid in contemporaneous transactions. *Ibid.* Under those circumstances, the markup is the amount by which the retail price to a customer exceeds the firm's contemporaneous cost. *Ibid.*

For many of the Barclays West transactions, petitioner was aware of Brennan Ross's contemporaneous cost because he was purchasing the stock from his customers at the same time he was selling the stock to other customers. Pet. App. A6. For instance, on one day he purchased a block of 160,000 shares at 19 3/4 cents per share from a customer and that same day sold more than 460,000 shares to other customers at prices ranging from 25 cents per share to 37 1/2 cents per share, reflecting markups of 20% to 80%. See SEC R. 890-892. The markups on the 95 transactions at issue in this case ranged from 14% to more than 80%—all well in excess of the NASD's 5% guideline on markups for such securities.[3] See *id.* at 890-895.

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[3] The NASD's Mark-Up Policy, an Interpretation under Article III, Sections 1 and 4, provides in pertinent part:

Between August and October 1989, petitioner purchased 445,650 shares of Barclays West stock from his customers and sold 1,052,550 shares. Pet. App. A3. The transactions yielded gross commissions of $93,999, producing $65,799 in compensation for petitioner. *Id.* at A4.

3. a. The NASD's District Business Conduct Committee for District No. 5 charged petitioner with violating Article III, Sections 1 and 4 of the NASD's Rules of Fair Practice by selling securities to customers at unfair prices. A hearing panel found petitioner responsible for charging excessive markups and censured him, fined him $20,000, and suspended him for four weeks from association in any capacity with any NASD member. SEC R. 1568-1579. On review, the NASD's National Business Conduct Committee affirmed the hearing panel's determination and sanctions, and it imposed, as an additional penalty, a requirement that petitioner requalify as a registered representative[4] by examination following completion of his suspension. *Id.* at 1792-1806.

> It shall be deemed conduct inconsistent with just and equitable principles of trade for a member to enter into any transaction with a customer in any security at any price not reasonably related to the current market price of the security or to charge a commission which is not reasonable.

NASD Manual ¶ 2154, at 2051 (1994). The NASD has adopted 5% as a guideline in analyzing excessive markups in equity securities transactions. *Id.* at 2050-2051.

[4] Under the NASD's rules, securities salesmen like petitioner are "registered representatives" of member firms. Art. IV, Sections 1 and 2 of the NASD's By-Laws, *NASD Manual* ¶¶ 1151-1152, at 1201 (1994); Pt. III of Schedule C to the NASD's By-Laws, *NASD Manual* ¶ 1785, at 1542-1545 (1994).

b. Petitioner applied to the Commission for review of the NASD's decision. Based upon an independent review of the record, the Commission sustained the NASD's disciplinary action. App., *infra*, 7a-8a. The Commission rejected petitioner's argument that, as a registered representative (as opposed to the firm itself or its principals), he should not have been held accountable for the excessive mark-ups. *Id.* at 7a, 8a n.18. The Commission found that because petitioner controlled the amount of his commissions (and thereby the final retail price of the stock) within the parameters set by the firm's trading department, he had to be aware that the commissions represented a suspiciously high percentage of the prices paid by customers—usually 25% or more of the retail price. *Id.* at 5a-6a. In addition, the Commission noted that petitioner was directly aware of the firm's contemporaneous cost on many occasions, having acquired about 25% of the firm's total inventory of Barclays West stock from his own retail customers. *Id.* at 7a. On the basis of these and other record facts, the Commission found that petitioner was accountable for the excessive markups. *Ibid.*

c. The court of appeals affirmed. Pet. App. A1-A9. The court found that petitioner was in a position to know that his sales entailed excessive markups, based upon the high commissions set on his own sales transactions and his direct knowledge of the price paid by the firm in its purchases from his customers. *Id.* at A6. It rejected petitioner's argument that holding him liable represented a departure from a prior Commission decision, *In re Langley-Howard, Inc.*, 43 S.E.C. 155 (1966), in which the Commission had declined to hold individual salesmen responsible for excessive markups. Pet. App. A7. Implicit in the *Langley-Howard* decision, the court noted, was the proposition that salesmen may be held

accountable for pricing violations if they are on notice that unfair prices are being charged. Pet. App. A7. It similarly rejected petitioner's objection to the sanctions, finding that the Commission had acted well within its broad discretion. *Id.* at A8.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Petitioner's arguments to the contrary are fact-bound and entirely without merit. Further review of this case is therefore unwarranted.

1. The court of appeals properly held petitioner liable for selling securities to his customers at unfair prices. Petitioner does not dispute the Commission's finding that his customers were charged excessive markups. Rather, he contends (Pet. 13-21) that he should not be held accountable because under the NASD's rules and the firm's internal procedures, Brennan Ross's trading department and its principals were responsible for supervising the salesmen and maintaining prices in compliance with the NASD guidelines. He was, he says, merely a registered representative, charging his customers prices set by the firm.

There is no merit to petitioner's contention that the supervisory responsibilities imposed on a firm and its principals by the NASD shielded him from his own responsibility for charging his customers fair prices. Nor did Brennan Ross's decision to place responsibility on its trading department for establishing the markup range relieve petitioner of his responsibility to sell to his customers at a fair price. To the contrary, the NASD Rules of Fair Practice expressly provide that a registered salesman, as a person associated with a member firm, has a duty concurrent with that of his firm

to conduct his activities in accordance with the NASD rules.[5]

A securities salesman who is in a position to know that the prices he is charging are unfair is thus properly held accountable for violating the NASD rules prohibiting that practice. In this case, petitioner had the information needed to call into question the fairness of the prices he charged. He knew from his own sales activity and that of the other salesmen in his office that Brennan Ross dominated and controlled the market in Barclays West stock.[6] He had direct knowledge of the firm's contemporaneous cost because of the purchases he made directly from his customers. He knew the prices his customers were being charged when they bought Barclays West stock from him. He also knew what his commission was on each transaction and could see that the commission represented a substantial portion of the

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[5] Article I, Section 5(a) of the NASD Rules of Fair Practice provides in pertinent part:

> Persons associated with a member shall have the same duties and obligations as a member under these Rules of Fair Practice.

NASD Manual ¶ 2005, at 2011 (1994).

[6] Petitioner erroneously contends (Pet. 25-26) that the Commission improperly ascribed special knowledge to him of Brennan Ross's markup and pricing procedures because he was a branch manager. The Commission acknowledged that petitioner was liable only as a salesman. App., *infra*, 2a n.4. The Commission did not hold him liable as branch manager for the unfair prices charged for Barclays West stock, recognizing that he did not have a supervisory role with respect to Brennan Ross's pricing determinations or operations in general. The Commission did take into account, however, that as manager of the New Orleans branch office, petitioner was in a position to observe the office's sales activity in Barclays West stock. See App., *infra*, 7a.

price charged to his customers. Such circumstances put petitioner on notice that his customers were being charged excessive markups, and he was rightly held accountable. See *Orkin* v. *SEC*, No. 93-4415, 1994 WL 461848, at *9 (11th Cir. Sept. 13, 1994) (expressly adopting holding of Fifth Circuit in this case that a salesman with knowledge of excessive markups may be held liable for violating Sections 1 and 4 of the NASD Rules).[7]

2. Holding petitioner accountable does not represent an *ex post facto* change in the law, as petitioner contends (Pet. 21-24). The NASD's prohibition against excessive markups has always applied to salesmen as a matter of law by virtue of Article I, Section 5(a) of the Rules of Fair Practice.[8] And, notwithstanding petitioner's con-

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[7] Petitioner errs in contending (Pet. 24-26) that the Commission and the court of appeals surreptitiously converted the charge against him from violation of the markup rule to violation of the rule against unreasonable and discriminatory commissions (Article III, Section 3 of the Rules of Fair Practice). Petitioner was charged with and was found to have committed violations of the NASD's requirement that customers be charged fair prices. The high commissions petitioner charged were cited not as an independent violation, but rather as one factor that ought to have alerted him to the fact that the Barclays West markups were too high.

[8] Contrary to petitioner's apparent understanding, associated persons have been held liable in other cases under Article I, Section 5(a) for violation of NASD rules addressed to member firms. See, *e.g.*, *In re Eric M. Diehm*, Securities Exchange Act Release No. 33,478, 55 SEC Docket 2830, 2832-2833 n.8 (Jan. 14, 1994) (registered representative); *In re Charles L. Campbell*, 49 S.E.C. 1047, 1051 n.12 (1989) (principal); *In re Whiteside & Co.*, 49 S.E.C. 963, 965 n.7 (1988) (principal), aff'd, 883 F.2d 7 (5th Cir. 1989); *In re William E. Brandow*, 46 S.E.C. 1113, 1114 n.3 (1977) (registered representative).

trary view, his treatment in this case is fully consistent with Commission precedent.

Implicit in the Commission's decision in *In re Langley-Howard, Inc.*, 43 S.E.C. 155 (1966), not to hold the subject salesmen accountable for pricing violations was the Commission's recognition that salesmen may indeed be held responsible in appropriate circumstances. In *Langley-Howard*, the Commission reversed the NASD's finding that the salesmen had sold securities at unfair prices because it was "not clear whether the compensation received by the member's salesmen should have put them on notice that the mark-ups were or might be unfair." *Id.* at 162. In reaching that conclusion, the Commission noted that the salesmen did not, as a rule, receive commissions on their sales, but were paid a percentage of the firm's monthly gross profit. *Ibid.* While the salesmen did receive a fixed commission for selling a small block of stock the firm had acquired at a bargain price, the salesmen had no reason to know that the purchase price was other than the published inter-dealer quotation. *Ibid.*

In contrast, petitioner had personal knowledge of Brennan Ross's cost because of his own contemporaneous purchases from customers. Moreover, he set (and thus knew) his commission within the broad bounds established by the firm's trading department. Here, because petitioner knew that his customers were paying excessive markups on their purchases of the Barclays West stock, holding him accountable is entirely consistent with the holding of *Langley-Howard*.[9]

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[9] Contrary to petitioner's interpretation, the Commission's decision in *In re Willis H. Brewer, Jr.*, Exchange Act Release No. 31964, 53 SEC Docket 2363 (Mar. 9, 1993), is also consistent with *Langley-Howard*. Petitioner asserts (Pet. 21) that the Commission

3. Petitioner has not shown, and cannot on this record show, that the Commission abused its broad discretion in approving the sanctions imposed upon him. Those sanctions properly reflect the nature and extent of his misconduct. Despite strong indications of unfair pricing, petitioner substantially overcharged his customers in numerous transactions over a three-month period, generating gross commissions of almost $94,000 and compensation for himself of more than $65,000.

Nor can petitioner legitimately complain that his sanctions are disproportionate to those received by others at Brennan Ross. Petitioner has no legal right to the same pre-hearing settlement offers or the same ultimate sanctions as other parties in this case. Appropriate remedial action depends upon the facts and circumstances of each case and each party, and cannot be determined merely by comparison with the action taken in other cases or against other parties. *Butz* v. *Glover Livestock Commission Co.*, 411 U.S. 182, 187 (1973). Here, petitioner was personally responsible for most of Brennan Ross's trading in Barclays West stock, and the Commission accordingly concluded that peti-tioner's conduct "was particularly egregious, justifying more severe sanctions." App., *infra*, 10a n.23. The censure, fine, suspension and re-examination require-ment were commensurate with petitioner's level of culpability and

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used *Brewer* to provide a precedent in this case for ignoring or overturning *Langley-Howard*. Although the Commission noted, parenthetically, that *Langley-Howard* might not be decided the same way if it were considered today, it carefully distinguished the facts in *Brewer* (as it later did the facts of this case) based on the salesmen's position of knowledge with respect to the excessive markups. 53 SEC Docket at 2368 & n. 19.

were neither excessive nor oppressive. See Exchange Act Section 19(e)(2), 15 U.S.C. 78s(e)(2).[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1994

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[10] Moreover, even if petitioner's sanctions were deemed disproportionate to those received by the others, "mere unevenness in the application of the sanction does not render its application in a particular case 'unwarranted in law.'" *Butz*, 411 U.S. at 188.

APPENDIX

IN THE MATTER OF THE APPLICATIONS OF
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WILLIAM C. BOEHMER, JR.
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AND
CHARLES D. BLOCK, JR.
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FOR REVIEW OF DISCIPLINARY ACTION
TAKEN BY THE NATIONAL ASSOCIATION OF
SECURITIES DEALERS, INC.
Admin. Proc. File No. 3-7598
March 10, 1993

OPINION OF THE COMMISSION

I.

Robert A. Amato, William C. Boehmer, Jr., and Charles D. Block, Jr. (together with Amato and Boehmer, "Applicants") who were former salesmen in the New Orleans branch office of Brennan Ross Securities, Inc. ("Brennan Ross" or the "Firm"), formerly a member of the National Association of Securities Dealers, Inc. (the "NASD"), appeal from

an NASD disciplinary action.[1] The NASD found that Applicants engaged in transactions with customers at unfair prices in violation of Article III, Sections 1 and 4 of the NASD's Rules of Fair Practice.[2] The NASD censured Applicants; fined Amato $20,000 and suspended him in all capacities for four weeks; fined Boehmer and Block $5,000 each and suspended each of them in all capacities for one week; and required each of the Applicants to requalify by examination as a registered representative following completion of his suspension.[3] Our findings are based on an independent review of the record.

II.

From August through October 1989, Boehmer, Block, and Amato (who was the manager of the New Orleans office[4]) solicited transactions with customers in the common stock of Barclays West, Inc. ("Barclays") at unfair prices. Barclays was a so-

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[1] Brennan Ross was expelled from membership in early 1991 for failure to pay NASD fines and costs. The Firm along with its president, Barry Bates, and its head trader, Michael D. Pittman, also respondents in this matter, entered into a settlement of these proceedings.

[2] Section 1 requires the observance of "high standards of commercial honor and just and equitable principles of trade." Section 4 requires that prices charged in over-the-counter principal transactions with customers be "fair, taking into consideration all relevant circumstances. . . ."

[3] The NASD also assessed costs.

[4] Amato contends that he was merely an "administrative branch manager," and did not have supervisory responsibilities. He also claims that the NASD was bound by a finding of its District Business Conduct Committee that all of the Applicants "acted solely as salesmen" in this matter. For purposes of this opinion, we accept Amato's assertions.

called "blank check" or "blind pool" offering,[5] selling for less than a dollar. Brennan Ross had been an underwriter of Barclays' initial public offering, which closed on August 2, 1989. Between August and October, Brennan Ross effected 91.07 percent of all purchases and 90.57 percent of all sales of Barclays stock. The New Orleans office was responsible for roughly 80 percent of the Barclays transactions effected by the Firm.

The NASD found that Brennan Ross dominated and controlled the market. Therefore, the NASD calculated the Firm's markups on the basis of the Firm's contemporaneous cost, resulting in markups ranging from 10 to 80 percent.

We agree that Brennan Ross dominated and controlled the market for Barclays and that the Firm's contemporaneous costs are the appropriate basis on which to compute these markups. As we have repeatedly held, markups are computed on the basis of the prevailing market price.[6] Generally, the prevailing market price means the price at which dealers trade with each other, *i.e.*, the current inter-dealer market. However, where, as here, a dealer dominates and controls the market for a particular security, the best evidence of the prevailing market price is the price that the dealer pays other dealers in contemporaneous transactions, rather than the price it charges in inter-dealer sale transactions or

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[5] Its prospectus described Barclays as "a development stage enterprise formed . . . to evaluate, structure and complete a merger with, or acquisition of, prospects consisting of private companies, partnerships or sole proprietorships."

[6] *Alstead, Dempsey & Company, Incorporated*, 47 S.E.C. 1034, 1035 (1984).

validated ask quotations.[7] If there are no contemporaneous purchases from other dealers, purchases from retail customers may be used to determine prevailing market price, subject to an imputed markdown being added to the purchase price. The use of an imputed markdown reflects that the price at which the dealer purchases a security from its customer will generally be less than the amount that the dealer would have paid for that security in the inter-dealer market.[8]

Our review of the record supports the NASD's findings—which are basically undisputed—of markups exceeding five percent[9] in the following number of transactions: Amato: 95; Boehmer: 26; and Block: 34.[10]

III.

Applicants do not dispute that the prices charged by the Firm were excessive. However, Applicants argue that they cannot be held responsible for Brennan Ross' markups of Barclays stock. Applicants concede that they had some discretion over retail prices as a means of setting their own commissions. They claim, however, that they relied on Brennan Ross' trading department to ensure that

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[7] *Meyer Blinder, et al.*, Securities Exchange Act Rel. No. 31095 (August 26, 1992), 52 SEC Docket 1436, 1441, *appeal docketed sub nom. Gordon* v. *SEC*, No. 92-11554 (D.C.Cir.) (appeal pending).

[8] *Meyer Blinder, supra*, at 1443. In all but a few instances, Brennan Ross acquired Barclays stock from its retail customers.

[9] Indeed, the markups generally were well in excess of ten percent.

[10] The NASD found that the Applicants had charged excessive markups in, respectively, 96, 27 and 38 transactions.

those prices were fair because the Firm's procedures manual assigned "responsibility [to] the Trading Department to point out any mark-ups that seem[ed] excessive." They contend that it is inconsistent for the NASD to require firms to implement such procedures and then hold representatives liable for following them. [11]

These contentions are unpersuasive. Each of the Applicants was intimately involved in the pricing of these securities within parameters set by Brennan Ross' trading department. For each transaction, the trading department would provide a "wholesale" or "strike" quotation and an ask quotation. The salesman could effect sales at any price between the wholesale and the ask quotations.[12] The salesman's gross commission was the difference between the wholesale quotation and the retail price charged, and his compensation was based upon a fixed percentage of his gross commissions.

The Applicants controlled the amount of their commissions, and had to be aware that they represented a suspiciously high percentage of the prices paid by customers.[13] Most of their commissions on

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[11] Boehmer and Block also claim to have relied on Amato, as branch manager, to ensure their compliance with NASD rules.

[12] Prices could exceed the ask quotation only when necessary to generate the Firm's minimum commission of $60 per trade.

[13] Applicants note that we declined to hold individual salesmen responsible for unfair pricing in *Langley-Howard, Inc.*, 43 S.E.C. 155, 162 (1966). In *Langley-Howard*, the salesmen received such large commissions that the NASD concluded the salesmen should have been on notice that the prices charged by the firm were unfair. We disagreed. In that case, we found that the salesmen generally did not receive fixed commissions on their sales, but instead were paid a percentage of their firm's monthly gross profits on the stocks

individual sales were approximately 25 percent or more of the retail price paid by customers in the case of Amato, and roughly 20 percent or more in the case of Boehmer and Block.[14] Moreover, even if we were to measure the markups from the Firm's "wholesale" quotations (which the salesmen noted on many of their order tickets),[15] the resulting markups were often well in excess of ten percent.[16] Thus,

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in question. With respect, however, to a small block of shares that *Langley-Howard* had bought at a bargain price, the firm promised the salesmen a specified commission. Under those circumstances, we held that the commissions on transactions relating to that block would not necessarily have put the salesmen on notice of improper pricing. We did not state in *Langley-Howard* that high commissions could never alert a salesmen to the possibility of unfair markups. Here, the salesmen routinely received (and indeed set) very large commissions. We have also recently noted that, in our view, the *Langley-Howard* case would not necessarily be decided in the same manner if we were to consider it today. *Willis H. Brewer, Jr.*, Securities Exchange Act Rel. No. 31964 (March 8, 1993) — SEC Docket ——.

[14] Amato also received an override of 20 percent on business generated by the New Orleans office.

[15] Copies of order tickets placed in the record are not entirely legible, making it impossible to know in several instances the Firm's wholesale quotations.

[16] Applicants further argue that, as mere salesmen in a branch office, they lacked access to the information needed to evaluate the fairness of the markups. They note that an NASD examiner testified that the examiner was unable to complete his analysis of the pricing at issue by reviewing only records on hand at the New Orleans office. The examiner also had to review records maintained at Brennan Ross' headquarters and to consult other firms that traded in Barclays.

The fact that an NASD examiner employed sources other than those present at the New Orleans office—and thus not readily available to the salesmen—is clearly not determinative. Applicants' liability is premised on a finding that they should,

regardless of whether Applicants actually knew Brennan Ross' contemporaneous costs, they should, at a minimum, have questioned the large markup between the Firm's "wholesale" quotes and the prices they were permitted to charge the public.

Finally, we observe that, although the record supports the NASD's findings of violations against all three of the Applicants, it paints an especially troubling picture of Amato's role in this matter. It is clear that on many occasions Amato knew the Firm's contemporaneous cost because he, on the Firm's behalf, acquired roughly a quarter of Brennan Ross' inventory of Barclays stock from retail customers. Amato also had to know that Brennan Ross dominated and controlled the Barclays market. He personally had sold over one-half the total number of units issued during the Barclays initial public offering. Then, when secondary trading commenced, the New Orleans office effected roughly 80 percent of all Barclays transactions executed by Brennan Ross. As mentioned, Amato managed that office and was responsible for the bulk of those transactions.

Under the circumstances, we have no hesitation in holding the Applicants responsible for these markups. Their efforts to blame the failings of others at the Firm for their own misconduct are, in our view, wholly unpersuasive.[17] We therefore sustain the

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at the least, have questioned the fairness of the prices charged and failed to do so.

[17] It seems clear to us that the placing, by management, of primary compliance responsibility with respect to certain requirements with one component of a firm (here, the trading department) does not relieve other components of that firm (such as the sales force) of their responsibility. Thus, we have held before that a failure to supervise salesmen does not in any way insulate those salesmen from liability under the antifraud

NASD's findings that Applicants violated Sections 1 and 4 of Article III of the Rules of Fair Practice.[18]

IV.

Amato claims misconduct on the part of the NASD staff.[19] Amato charges that this NASD disciplinary action was brought, and other forms of harassment—including the mailing of questionnaires to over 200 of his clients—were instituted, as a means of penalizing him for a complaint he filed with NASD headquarters about the conduct of regional NASD personnel. He also presents letters from the NASD to his then-current employer informing the employer that he had been suspended as a result of disciplinary proceedings. Amato contends that the NASD should not have publicized the fact of his sanction pending his appeal. Additionally, Amato submitted a copy of an NASD "disclosure summary," released through the NASD's public disclosure program, which inaccurately reported that he had committed fraud and which failed to note that Amato was appealing. The

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provisions of the securities laws. *Donald T. Sheldon*, Securities Exchange Act Rel. No. 31475 (November 18, 1992), 52 SEC Docket 3826.

[18] Amato's contention that the NASD rules do not apply to salesmen is wrong. *See* Article I, Section 5(a) of the Rules of Fair Practice ("Persons associated with a member shall have the same duties and obligations as a member under these Rules of Fair Practice.").

[19] These allegations are contained in a personal statement accompanying his brief. We hereby admit this statement and two reply briefs filed by Amato, along with attachments thereto, as additions to the record.

NASD subsequently corrected the errors in that summary.[20]

We do not believe Amato has shown that the NASD acted improperly. The NASD's action in publicizing the results of its proceedings against Amato was consistent with longstanding policy, and is no evidence of NASD hostility toward him. As we previously have observed, "in accordance with a resolution of its Board of Governors, the NASD regularly publicizes the sanctions it imposes if they are of a severe nature, whether or not those sanctions are appealed to this Commission."[21] While it is unfortunate that the initial reports contained errors, the NASD made prompt corrections when the misstatements were brought to its attention. Thus in our view, Amato has failed to establish that any

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[20] Amato also notes that the NASD's general counsel acknowledged by letter that Amato received "some incorrect or incomplete information" from NASD personnel in connection with the handling of an arbitration matter. Neither the nature of this information nor the subject matter of the arbitration proceeding (which appears to have been a claim against Amato that was dismissed) is clear from the record. We therefore are unable to find any prejudice to Amato.

Additionally, Amato makes vague allegations that the local NASD staff is being investigated by the F.B.I. and this Commission, and that the NASD's regional counsel "suddenly" left that office following the NASD's consideration of the appeal of its District Business Conduct Committee's decision in this case. Amato, however, has provided virtually no support for these charges, nor shown how they might be relevant to our consideration of his appeal. We therefore reject his request that we direct the NASD to provide him with any "evidence" it has on these matters. *See, e.g., International Research & Management Corp.*, 46 S.E.C. 1167, 1172 (1978).

[21] *David D. Esco, Jr.*, 46 S.E.C. 1205, 1208 (1978). *See also DWS Securities Corporation*, Admin. Proc. File No. 3-7703, *Order Denying Stay*, (May 1, 1992).

errors in reporting were part of a concerted effort to harm him.

Nor do we find anything improper about the NASD's use of a customer questionnaire. Such practice is a necessary and appropriate means of gathering information on members' sales practices. It thereby furthers the NASD's regulatory objectives. We also note that the NASD sought to minimize any adverse effect from the questionnaire by stating in its cover letter that "[t] his is a routine request and should not be taken as an indication of any wrongdoing on the part of the firm or the representative." In any event, Amato's complaints are irrelevant to the issue of his liability for these markups.[22]

The Applicants contend that the sanctions are excessive. We disagree. Their misconduct was

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[22] See *David D. Esco, Jr.*, 46 S.E.C. 1205, 1207, n. 7 (1978) (Alleged bias of investigator did not affect the fairness of the NASD proceedings or findings.).

We further note that no showing of selective prosecution has been made. In addition to Amato's allegations, Boehmer questioned why salesmen in other offices and at other firms were not found to have charged excessive markups on sales of Barclays stock. He also quoted, second hand, an unnamed member of the NASD board in this case as saying that the NASD was "out to get the Penny Stock firms."

To establish selective prosecution, one must show both that he was singled out for enforcement action while others similarly situated were not, and that the action was motivated by arbitrary or unjust considerations, such as race, religion or the desire to prevent the exercise of a consti-tutionally-protected right. *U.S.* v. *Huff*, 959 F.2d 731 (8th Cir.1992); *C.E. Carlson, Inc.* v. *S.E.C.*, 859 F.2d 1429, 1437 (10th Cir.1988). Neither showing has been made here.

serious.[23] Despite indications of unfair pricing, they sold their customers securities at excessive markups, generating extravagant commissions for themselves.[24] Under the circumstances, we are unable to conclude that the sanctions imposed by the NASD are excessive or oppressive.[25]

An appropriate order will issue.[26]

By the Commission (Chairman BREEDEN, Commissioners SCHAPIRO, ROBERTS, and BEESE).

Jonathan G. Katz
Secretary

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[23] As discussed *supra*, Amato's conduct was particularly egregious, justifying more severe sanctions.

[24] Our finding of slightly fewer excessive markups than was found by the NASD (see n. 10 *supra*) does not justify any modification in the sanctions imposed by the NASD.

[25] We reject Amato's claim of excessive sanctions based upon the fact that more senior Firm personnel, who settled with the NASD, received what Amato characterized as "far more lenient treatment." See n. 1, *supra*. The appropriate remedial action depends on the facts and circumstances of each particular case and cannot be determined precisely by comparison with the action taken in other cases. See *Butz* v. *Glover Livestock Commission Co., Inc.*, 411 U.S. 182, 187 (1973). Moreover, we have observed that "in settled cases we take into account pragmatic considerations such as the avoidance of time-consuming and manpower-consuming adversary proceedings." *Blinder Robinson & Co., Inc.*, 48 S.E.C. 624, 636, n. 36 (1986).

[26] All of the contentions advanced by the parties have been considered. The contentions are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.